

(1) Supreme Court, U.S.
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In The OFFICE OF THE CLERK
Supreme Court of the United States

JOSEPH E. NAPIER,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

On Petition For Writ Of Certiorari
To The Indiana Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Confrontation Clause permits the admission against a criminal defendant of a letter of certification and a breath test evidence ticket without the opportunity for cross-examination.

II. Whether Indiana's procedure for the prosecution of drivers suspected to be over the legal alcohol limit, which fails to provide for a witness who may be cross-examined, is fundamentally at odds with the right of confrontation.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Joseph E. Napier petitions for a writ of certiorari to review the rehearing decision of the Indiana Court of Appeals in this case.

OPINIONS BELOW

The original opinion of the Indiana Court of Appeals (Pet. App. 10a-24a) is published at *Napier v. State*, 820 N.E.2d 144 (Ind. Ct. App. 2005). The opinion upon rehearing (Pet. App. 1a-9a) is published at *Napier v. State*, 827 N.E.2d 565 (Ind. Ct. App. 2005). The Indiana Supreme Court denied discretionary review without opinion (Pet. App. 25a-26a).

JURISDICTION

The Indiana Court of Appeals issued its decision on rehearing on May 17, 2005. The Indiana Supreme Court denied discretionary review on July 26, 2005. On September 27, 2005, the petitioner filed his Application For Extension Of Time To File Petition For Writ Of Certiorari, which Justice John Paul Stevens granted on October 06, 2005. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides in relevant part: "In all criminal

prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

STATEMENT OF THE CASE

Napier was convicted of operating "a vehicle with an alcohol concentration equivalent of at least eight-hundredths (0.08) gram of alcohol but less than fifteen-hundredths (0.15) gram of alcohol . . . per two hundred ten (210) liters of the person's breath."¹ This is a so-called *per se* offense, meaning proof alone of an illegal alcohol level at the time of driving is sufficient to convict an accused.

The case raises a Confrontation Clause issue which has divided state courts. It presents this Court with the opportunity to further define the meaning of "testimonial" within the context of the *Crawford* decision as it may apply to evidentiary certificates used in the prosecution of intoxicated driving offenses. It asks the Court to determine whether a breath test evidence ticket may be admitted against a criminal defendant pursuant to a state hearsay evidence exception without a witness subject to cross-examination. The case tests whether Indiana's procedure permitting the prosecution of drivers for the *per se* offense using documentary evidence and evidentiary presumptions, and failing to provide for a witness who may be cross-examined, is fundamentally at odds with the right of confrontation.

1. In this case the trial court admitted a letter of certification sent to the clerk of the circuit court in Morgan

¹ Ind. Code § 9-30-5-1(a).

County, Indiana, where the breath test machine at issue was used, reporting an inspection of the machine occurred on "8/13/2003," and that the machine "is in good operating condition, satisfying the accuracy requirements set out by State Department of Toxicology Regulations."² In Indiana this certificate is admitted by statute in a prosecution for an operating while intoxicated offense, and:

Constitute[s] prima facie evidence that the equipment or chemical: (A) Was inspected and approved by the department of toxicology on the date specified on the certificate copy; and, (B) Was in proper working condition on the date the breath test was administered if the date of approval is not

² To: Clerk, Circuit Court Morgan County

From: State Department of Toxicology

Date: August, 2003

Re: CERTIFICATE OF INSPECTION AND COMPLIANCE OF BREATH TEST INSTRUMENTS FOR USE PURSUANT TO THE INDIANA LAW FOR IMPLIED CONSENT TO TEST FOR INTOXICATION.

Pursuant to the authority granted by IC 9-30-6-5 (1991), and the Regulations promulgated thereto, 260 IAC 1.1, inspection and tests of the following instrument were conducted on the date shown below, the results of which are hereby certified, to-wit:

The instrument is in good operating condition, satisfying the accuracy requirements set out by State Department of Toxicology Regulations.

[8/13/2003 Inst. # 960130 Mooresville PD 104 W. Main St.]

/s/ Peter F. Method, Ph.D

Director, State Department of Toxicology.

* * *

The original Letter of Certification, issued by the State Department of Toxicology, must be kept on file in the office of the clerk of the Circuit Court and may be duplicated as needed for use in Court. [Original emphasis.]

more than one hundred eighty (180) days before the date of the breath test; . . .³

The letter of certification is not the record of inspection compiled by an inspector charged with the duty to inspect; rather, it is a letter stating the inspection occurred, and that the writer has determined the machine met the requirements for certification. The official issuing the letter is charged with the duty to make that determination, although he did not perform the inspection, and to issue the *original* letter to the county court clerk where the machine is located so that it "may be duplicated as needed for use in court." See fn. 2. The letter serves as a foundation document for the admissibility of a breath test. The letter of certification does not include the records of the actual inspection, nor does it purport to certify the inspection records as true and accurate. The letter does not disclose the grounds upon which the director of the department of toxicology relied for his certification, but states his finding that the machine is in good operating condition, and that it satisfies Indiana's regulatory requirements for testing.

As is normal in Indiana, the admission of this letter of certification occurred without a witness who could be cross-examined regarding the inspection which was made, the findings of the declarant, or how well those findings presage the operating condition of the machine at the time of Napier's test. It was at this stage of the proceeding that Napier first objected on confrontation grounds based upon this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004).

³ Ind. Code § 9-30-6-5(c)(1) and (2).

By statute, the admission of this letter of certification established *prima facie* evidence the machine was in good working order at the time of Napier's test on November 12, 2003, within one-hundred eighty (180) days of the inspection. Napier challenged his inability to cross-examine a knowledgeable witness in his trial as to inspection, calibration, machine set-up, and whether the machine was in good working order at the time of his breath test. Napier asserted that the use to which the letter of certification is put in Indiana goes far beyond merely recording that a required inspection was performed. It is testimonial as to its declarations, and it is given a testimonial purpose, to provide *prima facie* evidence the machine was in good working order at the time of Napier's test.

2. The Indiana Court of Appeals began its decision on this issue by observing:

This is a case of first impression, where we are called upon to decide the applicability of the rule set forth in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), as it relates to the State's method of establishing a proper evidentiary foundation regarding the admissibility of various documents that are used to prove the results of a criminal defendant's breath test. Appellant-defendant Joseph E. Napier appeals his conviction for Operating a Vehicle With a BAC of .08 Percent Or More, [Footnote omitted] a class C misdemeanor, claiming that his conviction may not stand because admitting breath test results by certification documents and a BAC DataMaster Evidence Ticket (BAC ticket) violates the Confrontation Clause [Footnote omitted] of the United States Constitution.